It seems perfectly clear that there is nothing whatsoever in that case to make it applicable to the undiputed facts in our case.

It is next asserted by appellees at page 5 that reliance and laches were proved in the trial court. The lower court did not so understand it and *made no finding to that effect*. When the court refused to receive testimony, from one of these property owners on the question of increased traffic (R. p. 160, f. 3), it clearly indicated that the only reason it was permitting them to testify was to give their reasons for refusing to consent and not on any other issue in the case.

The property owners referred to testified to nothing but the reasons why they would not consent to the rezoning. None of them testified that they had any knowledge concerning the way in which the plaintiffs' property was zoned. None of them testified to any detriment and, of course, they did not testify to relying upon the way the plaintiffs' property was zoned because they apparently knew nothing about it. On the other hand the only testimony on the question of detriment was to the contrary.

The comment of the lower court referred to at page 6 of the motion was hardly a finding of estoppel and certainly was no finding of detriment.

With respect to the authorities cited by appellees on the subject of laches and waiver, it is to be noted that in the case of *Fifth Church Christ Scientist in Denver v. W. F. Pigg & Son*, 109 Colo. 103, 122 P. 2d 887, cited by appellees, the Court expressly found the making of large investments, while relying upon fourteen years of acquiescence.

In the case of *Wilson v. School District of Philadelphia*, 195 Atl. 90, cited by appellees, the Court referred to

Cooley's Constitutional Limitations (8th Ed.) page 368 et seq. in which Mr. Cooley said:

> "There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, *by prior action*, precluded himself from being heard against it."

He gives illustrations such as one who received a compensation award or brought an action to recover it as illustrative of the type of action he refers to. He also gives an illustration of a person obtaining a license under an ordinance alleged to be unconstitutional and when the license was revoked questioned its constitutionality, and other illustrations of the same type. These hardly help the appellees.

In the case of *Pierce v. Somerset Railway*, 171 U. S. 641, 648, 19 S. Ct. 84, 43 L. Ed. 316, cited by appellees, the quotation given at page 7 of the motion does not present the situation fairly. As a matter of fact the Court spent a great deal of time discussing the evidence and nowhere did it indicate that the evidence did not fairly justify the conclusion on the issue of estoppel or waiver. The situation is different in a case like ours where we asserted the facts upon which to reach the conclusion, that there was nothing in the record to justify finding of estoppel or laches. This Court has held that under such circumstances they will not be bound by the decision of the state court.

I should like to add a few cases in addition to those previously cited in our Jurisdictional Statement on the question of whether or not under the circumstances in this case the decision based in part on a non-federal ground should be used as a basis for declining jurisdiction.

The broadest statement for the rule concerning this decision we have been able to find is found in *Staub v. Baxley*, 355 U. S. 313, 2 L. Ed. 2d 302, 78 S. Ct. 277, where the Court said at page 309 as follows:

> "Whether the constitutional rights asserted by the appellant were '* * * given due recognition by the [Court of Appeals] is a question as to which the [appellant is] entitled to invoke our judgment, and this [she has] done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support * * * [for] if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.' *Ward v. Love County*, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 S. Ct. 419, and cases cited."

In the case of *Williams v. Kaiser*, 89 L. Ed. page 398, 323 U. S. 471, the Court said at page 403 of the Law Edition opinion as follows:

> "We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, 'it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' "

In the case of *Honeyman v. Hanan*, 81 L. Ed. 476, 300 U. S. 14, the Court said in syllabus #3 as follows:

> "The determination by the Supreme Court of the United States that a Federal question was necessarily passed upon by the state court of whose decision

> review by the Supreme Court of the United States is sought, and whether its decision of that question was necessary to determination of the cause, must rest upon an examination of the record; and a certificate or statement by the state court that a Federal question has been presented to it and necessarily passed upon is not controlling."

In the case of *McCoy v. Shaw*, 72 L. Ed. 891, the rule had been somewhat restricted as indicated by the headnote No. 1 in the Law Edition citation reading as follows:

> "A judgment of a state court which is put upon a non-Federal ground, independent of the Federal question involved and broad enough to sustain the judgment, cannot be reviewed by the Supreme Court of the United States, unless the non-Federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the Federal question."

Even under this statement of the rule, we believe this Court ought to accept jurisdiction because the statement in that headnote applies clearly to our case.

A few of the instances illustrating the applicability of that statement to this case are:

(a) The attempt of the court to base its decision upon estoppel and laches, when the issue was not raised in the pleadings, in the court below or passed upon by that court or raised at any time by the parties but only by the Supreme Court at the oral argument contrary to the decisions in the Minnesota Supreme Court, this may not be done.

(b) Finding laches or estoppel on the basis of statements of fact in the opinion expressly contrary to the record as already indicated.

(c) Relying upon the Kentucky case which has been shown to be clearly not applicable.

(d) By trying to evade the decisions of this Court on the question of confiscation by misstating facts concerning the extent of the confiscation. In this connection it misstated the language in the lower court, it misstated the evidence and if it relied upon the testimony of Garzon as to sales in the adjoining block (as seems to be the view of appellees in their motion to dismiss), it violated its own rule.

In closing, it is significant to note that in the motion to dismiss, there is no attempt to refute the following important portions of our Jurisdictional Statement:

(1) At page 6 we said:

> "The defendants offered no testimony as to the fair market value of the plaintiffs' lots after the bad condition was corrected. The defendants did offer testimony over the objection of these appellants as to the price for which lots in an adjoining block have been sold but made no attempt to compare them with the lots involved in this case." (R. pp. 437-445).

(2) At page 7 we said:

> "Mr. Gullickson testified that the erection of the proposed apartment buildings would not reduce the market value of the properties in the neighborhood." (R. p. 388).

(3) At page 7 we also said:

> "That the trial court in its memorandum attached to its decision (R. p. 31, f. 3) found that approximately one-fourth of the tract consists of soil and subsoil which would not require piling. This finding com-

p'etely ignored the fact that even though this portion of the property did not require piling and the undisputed testimony was that it was less than 15% of the tract."

(4) Pages 7 and 8, statement of the law as found in the *Pennsylvania Coal Company* case:

"* * * The protection of private property in the Fifth Amendment * * * provides that it shall not be taken for such (public) use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. (Citing case.) When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. (Citing cases.) We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

(5) At page 8 we said:

"However, if necessary so to do, the Court will find, by an examination of the record above referred to, that the cost of making the land suitable was greatly in excess of the fair market value of the lots so made suitable on the undisputed testimony in the case."

(6) Page 9, subdivision (d) reads as follows:

"With respect to the appellants' offer to improve the property with a fine set of apartments beautifully landscaped instead of using it for other uses, which might be permitted there if the zoning was invalid (R. p. 263; Exhibits I, J & K and R. p. 266), such as industrial uses, the Court, apparently thinking that these were quite acceptable, said it could not compel the result because Filister might not exercise his option. (See opinion in Appendix.) It ignored the fact that Mr. Bliss, the fee owner, had made the same offer in his complaint in intervention (R. p. 15) and that if Filister abandoned his option, the fee owner would still be bound by the proposal. Moreover the Court could bind him under our Declaratory Judgment Statute, as was done in the case of *Morris County Land Improvement v. Township of Parsippany-Troy Hills*, 40 N. J. 539.

"Our Declaratory Judgment Statute (Minnesota Statutes Annotated 555.01 and Minnesota Statutes Annotated 555.08 for Supplemental Relief) shows that the Court can retain jurisdiction to compel performance of such a proposal. In fact, our Court did this without urging in the case of *Katherine Elizabeth Pearce and Marie Elizabeth Pearce v. Village of Edina*, 263 Minn. 553, 108 N. W. 2d 659."

(7) Page 10 reads as follows:

"The Court said, Mr. Bliss testified that he thought $8,000 an acre was reasonable for the land before he completely understood the soil problems. (See opinion). We find no such statement in the record, but if it was, it would not have any bearing on the case because we are not concerned for this purpose, with the land in good condition.

"Then the Court adds a 'final touch' by referring to

the option price as evidence of value. (See Option.) The record is conclusive that the option price would not be exercised unless the zoning was declared invalid."

Instead of attempting to answer our refutation of the Court's statement in this connection, appellees merely reassert the Court's statement. This would seem to indicate that there was no adequate answer to our refutation of that statement.

(8) We recite several reasons why we think the question is substantial at page 11 of our Jurisdictional Statement, none of which are questioned, either as to fact or importance.

In conclusion, we believe this Court ought if necessary, decide whether or not taking *almost* 100% violates the rule laid down in the *Pennsylvania Coal Company* case.

Respectfully submitted,

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END